

1996

State of Utah v. Jana Westerman : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Utah v. Westerman*, No. 960721 (Utah Court of Appeals, 1996).

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

JANA WESTERMAN

Defendant/Appellant.

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Case No. 960721-C A

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF RESTITUTION IMPOSED INCIDENT
TO A CONVICTION FOR DRIVING WHILE UNDER THE INFLUENCE
OF ALCOHOL, IN DIVISION II OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE STEPHEN L. HENRIOD, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction over this appeal because it is taken from a final order of a criminal case in a court of record. §78-2a-3(e) Utah Code Annotated (UCA). The defendant/appellant appeals from the order of restitution issued by the Honorable Stephen L. Henriod of Division II of the Third Judicial District Court.

**STATEMENT OF THE ISSUES, STANDARD OF REVIEW
AND PRESERVATION OF THE ISSUES**

The defendant/appellant frames the issue as whether the trial court abused its discretion by ordering restitution in the amount \$38,643.59. The component arguments forwarded by the defendant raise these issues: (1) Did the trial court commit error as a matter of law in ordering restitution incident to a conviction for driving while under the influence of alcohol?; (2) May an insurance company be a "victim" for purposes of UCA §76-3-201, and therefore be awarded restitution?; and (3) Must a valid restitution order recite reasoning touching upon each statutory

criteria set forth at UCA §76-3-201(8)? These issues concern questions of law which are reviewed for correctness. *State v. Ramirez*, 817 P.2d 774 (Utah 1991). However, “[u]nless a trial court exceeds the authority prescribed by law or abuses its discretion, we will not disturb its order of restitution. *State v. Twitchell*, 832 P.2d 866, 868 (Utah App. 1992). At the restitution hearing conducted by the trial court on October 21, 1996, the defendant did preserve the issues of whether it is within the trial court’s discretion to order restitution incident to a DUI conviction, and whether an insurance company may be considered a victim to whom restitution may be ordered. Transcript of Restitution Hearing at page 7. The defendant did not, however, argue below that the trial court erred by failing to articulate its reasoning in support of the restitution order.

STATUTORY PROVISIONS

Utah Code Annotated §76-3-201, governs restitution as a component of a sentence imposed incident to a criminal conviction. In relevant part, it provides:

- (4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection... For purposes of restitution, a victim has the same meaning as defined in Section 77-38-2...
- (ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Sections (4)(c) and (4)(d).
-
- (c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.
 - (i) Complete restitution means the restitution necessary to compensate the victim for all losses caused by the defendant.
 - (ii) Court-ordered restitution means the restitution the court having criminal jurisdiction orders the defendant to pay as part of the criminal sentence at the time of sentencing
 - (iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).
- (d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the record.

-
- (8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court...
- (b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:
- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
 - (ii) the cost of necessary medical and related professional services...
-
- (c) In determining the monetary sum and other conditions for court-ordered probation, the court shall consider the factors listed in Subsection (b) and:
- (i) the financial resources of the defendant and the burden the payment of restitution will impose, with regard to the other obligations of the defendant;
 - (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
 - (iii) the rehabilitate effect on the defendant of the payment of restitution and the method of payment; and
 - (iv) other circumstances which the court determines make restitution inappropriate.
- (d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as the result of considering an order of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.

Utah Code Annotated §76-3-201.

The following statutory excerpts are also relevant to the resolution of this appeal:

The department may not reinstate any license suspended or revoked as a result of the conviction [of driving while under the influence], until the convicted person has furnished evidence satisfactory to the department that: ...all fines and fees *including fees for **restitution*** and rehabilitation costs assessed against the person have been paid...

Utah Code Annotated §41-6-44(7)(b)(ii)(emphasis added).

When a defendant sentenced to pay a fine or to make restitution defaults in the payment of any installment, the court on motion of the prosecution, victim, or upon its own motion may require [her] to show cause why [her] default should not be treated as contempt of court...

Unless the defendant shows that [her] default was not attributable to an intentional refusal to obey the order of the court or to a failure on [her] part to make a good faith effort to make the payment, the court may find that the default constitutes

contempt and may order [her] committed until the fine or restitution, or a specified part of it, is paid.

Utah Code Annotated §76-3-201.1(1) and (2).

“Victim of a crime” means any person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant...unless the natural person is the accused...or criminally involved in the crime...

Utah Code Annotated §77-38-2(9)(a)(3).

STATEMENT OF THE FACTS

The information in this case charged, inter alia, a class A misdemeanor in that on or about February 14, 1996, Jana Westerman operated a motor vehicle while she was under the influence of alcohol, or the combined influence of alcohol and any drug, to a degree which rendered her incapable of safely operating the vehicle, and that as a result of her having operated the vehicle in an unsafe manner she caused injury to another. Information for case number 965007611 TC. The probable cause statement in that information more specifically proffered that the defendant caused an accident with a vehicle wherein the defendant pulled out of a parking lot into a roadway and hit a car that had been traveling along the roadway. Id. On August 14, 1996, Ms. Westerman pled guilty to driving under the influence of alcohol after the charge was amended to be treated as a class B misdemeanor. In comments to the trial court at her sentencing hearing, Ms. Westerman’s counsel, Mr. Nielsen, explained that the collision occurred when Ms. Westerman’s car “...had stalled and was rolling out of a parking lot as it struck a vehicle coming out of the roadway.” Sentencing Transcript, at page 7.

During the sentencing hearing, the defendant, through counsel, urged the trial court to impose as restitution only the amount \$500.00, as had been recommended in the pre-sentence

report, which would reimburse the victim for her insurance deductible. Id., at page 2. Mr. Nielsen noted on behalf of the defendant that she was temporarily unemployed, having voluntarily quit her employment to stay home with her children (ages 20, 18, and 12), and that she was making efforts to return to work. Id., at page 4. Mr. Nielsen then argued that it would take the defendant years to pay full restitution. Id., at page 5. The trial court rejected the defendant's argument for the imposition of partial restitution, and ordered her to pay complete restitution totaling \$38,643.59. Id., at page 8. During the sentencing hearing, the court explained that it intended to order full restitution because it would be inequitable for any party to forego recovery for the harm caused by the defendant's drunken driving, or to incur additional expense in obtaining a judgment. Id., at pages 4-5. During further discussion with counsel, the trial court acknowledged that it might take the defendant "the rest of her life" to pay full restitution, and accordingly the defendant was ordered to make payments of \$100 per month with the expectation that the balance of unpaid restitution would be converted to a civil judgment upon the termination of her probation. Id., at page 9. The sentencing was then concluded with the understanding that the defendant could have a further hearing on the issue of restitution if she wished. Id., at page 10.

On October 21, 1996, a restitution hearing was convened at the defendant's request. At that hearing, the State proffered documentation in support of the finding that the financial impact of the crime amounted to \$38,643.59 based on the amounts being paid by the victim and her insurance company. Restitution Transcript, at page 3. Mr. Nielsen (appearing on behalf of the defendant, who chose not to attend the hearing), then questioned the reliability of the estimates upon which the insurance company was prepared to pay, but offered no evidence supporting a claim that the figure

presented by the State did not accurately reflect the actual costs. *Id.*, at page 5. Mr. Nielsen also argued that the holding in *State v. Robinson*¹ should be applied to bar the award of restitution arising from the conviction for DUI, but he made no argument that the defendant's operation of her vehicle was not the proximate cause of the damages, or that she was being denied the opportunity to present any meritorious defense against liability that would otherwise be available to her in a separate civil proceeding. *Id.*, at page 7. The trial court again declined to order less than complete restitution.

SUMMARY OF THE ARGUMENT

The defendant misapprehends the holding in *State v. Robinson*, 860 P.2d 979 (Utah App. 1993), when she asserts that the trial court was without authority to order restitution for damages arising from a DUI-related accident: *Robinson* does not hold that restitution may never be ordered in traffic-related cases, nor does it hold that restitution is generally inappropriate for damages caused by drunk drivers, and the defendant has not made out a due process challenge in any event. The defendant also misapprehends the meaning of "victim" for purposes of the restitution statute as not pertaining to an insurance company--the defendant's assertion has been expressly rejected by the Utah Supreme Court.² Finally, the defendant is incorrect in asserting that the this Court should

¹ *State v. Robinson*, 860 P.2d 979, 983 (Utah App. 1993), *cert denied*, 878 P.2d 1154 (1994).

² The defendant presents her argument that the trial court erred in awarding restitution to an insurance company, which she insists is not a "victim" for purposes of the restitution statute, without bringing to the Court's attention the holding in *State v. Stayer*, 706 P.2d 611 (Utah 1985). *Stayer* addressed exactly this issue, and noting the "victim" is a *person* who has suffered pecuniary damage, and that a "person" may be an individual, a public or private corporation, a government, a partnership, or an unincorporated association (citing UCA §76-1-601(5)), the court held that a trial court may properly order restitution to an insurance company to whom a right of recovery has been assigned. *Id.*, at 613. Because *Stayer* is controlling authority, the State will not address this issue further.

reach the unpreserved challenge to the trial court's findings, and anyway incorrectly asserts that the trial court failed to consider the statutory criteria set forth to guide orders of restitution.

ARGUMENT

I. *Robinson* does not Prohibit Restitution in all Traffic Offenses.

The principal argument in the defendant's appeal rests on the this statement by this court in *State v. Robinson*, 860 P.2d 979, 983 (Utah App. 1993): "...a restitution order will generally be inappropriate in a matter arising from a traffic violation that involved only negligence, and not criminal intent." Brief of Appellant, at page 9. Apparently, the defendant construes this statement to mean that as a matter of law, the ordering of restitution for driving-related criminal conduct constitutes a denial of due process of law. The State asserts that *Robinson* does not lend itself to such a bright line rule, but rather *Robinson* notes that restitution will **generally** be inappropriate in traffic cases, and *Robinson* addresses whether restitution was appropriate in a specific factual situation. The facts in *Robinson* are that the defendant was involved in a traffic accident wherein he collided with a motorcycle while changing lanes, that he failed to remain at the scene of the accident, and that he pled guilty to the crimes of improper lane change and failure to remain at the scene of an accident while insisting that he was "...not convinced that the accident was [his] fault." *Id.*, at 980, 983. Applying these facts to the articulation that "...an order of restitution will **generally** be inappropriate in a matter arising from a traffic violation that involves only negligence...[because] [r]estitution should only be ordered in cases where liability is clear..." *id.* (emphasis added), *Robinson* cannot be read to mean that restitution is inappropriate even when there is no controversy whether the defendant's conduct was the proximate cause of injury.

II. Restitution is not Inappropriate in DUI Cases.

Restitution is specifically contemplated by the Legislature in DUI cases. Pursuant to UCA §41-6-44(7)(b)(ii), the Legislature has provided that until restitution has been paid in full, the Department of Public Safety may not reinstate a person's driver's license.³ The distinct treatment of driving while intoxicated from other less-culpable conduct arising out of the operation of motor vehicles is likewise noted in *Robinson*, where this Court recognized that although victims from traffic accidents are generally not eligible for payments from the quasi-restitutionary Crime Victim's Reparations Fund, an exception is made for driving conduct that "... (i) causes personal injury or death with criminal intent; or (ii) constitutes the offense of driving while under the influence of alcohol..." *Id.*, at note 8 (citing UCA §63-63-2(9)(b)--since renumbered as UCA §63-25a-402(9)(b)). Similarly, the view that driving while under the influence of alcohol amounts to criminal negligence, and not mere carelessness nor simple negligence, has long been recognized by Utah courts. *See State v. Capps*, 176 P.2d 873 (Utah 1947), *State v. Ruben*, 663 P.2d 445 (Utah 1983).⁴ Given that this Court noted in *Robinson* essentially the same distinction between drunk driving and other driving conduct that is expressly recognized in UCA §41-6-44, and is likewise recognized in caselaw, and given that the reason for this distinction is because drunken driving involves a culpable assumption of risk rather than mere carelessness or simple negligence,

³ Although this portion of the statute pertains only to persons whose license has been suspended or revoked for a second or subsequent DUI, this distinction does not detract from the fact that the Legislature expected that the payment of restitution would be ordered in DUI cases.

⁴ In *Capps*, the Utah Supreme Court considered an appeal from a conviction for involuntary manslaughter, and held that driving a vehicle while intoxicated to the point of slurred speech and staggered gait is conduct that amounts to criminal negligence. *Capps*, 167 P.2d at 874. In *Ruben*, the Court considered whether punitive damages may be awarded against a defendant who drove while intoxicated, and cited *Capps* favorably in support of the proposition that drunkenness is properly considered as a factor in assessing whether a defendant has acted with criminal negligence because drunkenness indicates "recklessness and a marked disregard for the safety of others." *Ruben*, 663 P.2d at 449.

Robinson's general rule against restitution for non-culpable conduct has no application to drunken driving cases.⁵

III. This Defendant is not Treated Unfairly by the Award of Restitution.

Unlike in *Robinson*, where the defendant voiced concern to the trial court about issues such as proximate cause and other defenses, the defendant in this case has not been heard to complain that the amount of restitution is inappropriate because the other driver shared fault, nor has she raised any other issue or defense upon which the trial court should have found it inappropriate to order restitution. Instead of placing any facts in issue during the sentencing process--and thereby affording the State the opportunity to respond, the defendant has rested her argument on the bright-line construction she attributes to *Robinson*. She has failed to cast the facts of this case in any light that shows she is unjustly ordered to pay damages that resulted from her drunken driving. Accordingly, unless the defendant is correct in her supposition that restitution may never be ordered upon a conviction for DUI, she has preserved no claim that due process is denied in this case.

IV. The Defendant Preserved to Challenge to the Trial Court's Findings.

In her remaining point of argument, the defendant raises for the first time on appeal the complaint that the trial court did not adequately state for the record its reasoning in support of its restitution order. The defendant insists that this Court may reach this issue even though not argued

⁵ To avoid misunderstanding, the State does not assert that restitution will be appropriate in every case where an impaired driver is involved in an accident. The circumstance is easily imagined where a person driving a car while impaired, but who at the same time is obeying the speed limit and is respecting the rights-of-way of others, is hit due to the negligence of another driver. It is this type of complicating factor for which the trial court may elect, pursuant to UCA §76-3-201(8)(d), to decline an order of restitution to avoid the unnecessary prolongation of the sentencing process. Conversely, it is because no such complicating factors were present in this case that there was no reason for the trial court to eschew the statutory prescription that restitution *shall* be ordered.

below because UCA §76-3-201(4)(d)(i) directs the trial court to articulate its reasons for determining that restitution is appropriate or inappropriate, and therefore the alleged failure of the trial court constitutes plain error. This Court may reach this issue under the plain error doctrine if the error should have been obvious to the trial court *and* if the error was extremely harmful. *State v. Labrum*, 925 P.2d 937 (Utah 1996). In support of her plain error argument, the defendant relies on *Labrum*, where the trial court was found to have erred by failing to make written findings in support of a gang enhancement. *Labrum* is distinguishable from this case. The Court in *Labrum* reasoned that the imposition of gang enhancement penalties without written findings was extremely harmful because gang enhancements are predicated by statute on very specific factual findings, and because the trial court was on notice based on the prior holding in *State v. Nelson*, 725 P.2d 1353 (Utah 1986) that it was plain error to omit such written findings. *Id.*, at 939-40. Unlike in *Labrum*, the statute governing orders of restitution does not require written findings, nor does it require specific factual findings as a predicate to an order of restitution, and it raises a presumption favoring the order of restitution. UCA §76-3-201(4)(a)(i).⁶ Additionally, Utah precedent teaches that a restitution order will be presumed valid if the facts before the trial court could support an order of restitution. *State v. Stayer*, 706 P.2d 611, 614 (Utah 1985). Given the presumption favoring the imposition of restitution orders, and the presumption that restitution orders are valid unless unsupported by the record, the defendant has failed to show harmful error and this Court should reject the defendant's plain error argument.

⁶ "When a person is convicted for criminal activity that has resulted in pecuniary damages...the court *shall* order that the defendant make restitution to the victims..." UCA §76-3-201(4)(a)(i) (emphasis added).

V. The Trial Court Properly Articulated Reasoning Supporting the Restitution Order.

Even should the Court find it appropriate to reach this issue, the Court will find that the trial court did adequately express its reasoning in support of its restitution order. The first question in addressing this claim is: What findings must be entered into the record pursuant to the relevant statute? The pertinent passage states: “If the court determines that restitution is appropriate or inappropriate under *this subsection*, the court shall make the reasons for the decision a part of the record.” UCA §76-3-201(4)(d)(i)(emphasis added). The subsection to which this passage refers, paragraph (4) of UCA §76-3-201, provides that the court *shall* order the defendant to make restitution to the victim, that the court may order the defendant to pay for costs incurred in extradition, and that the court shall determine complete restitution and court ordered restitution. UCA §76-3-201(4). Accordingly, paragraph (4)(d)(i) applies in this case to mean that the trial court was obliged, in order to support its determination that restitution was appropriate, to state for the record why it chose to order complete restitution, rather than some lesser amount. The trial court did this by noting that the victims should not be further victimized by having to expend additional resources toward obtaining and enforcing a judgment against the defendant to make themselves financially whole from the damage caused by the defendant. Sentencing Transcript, at page 4. The trial court further explained that restitution was ordered in the amount \$38,643.59 because, absent any evidence to the contrary from the defendant, this amount was uncontroverted and supported by documentation submitted by the State. Restitution Hearing Transcript, at page 6. Because the issue of extradition costs was moot, the trial court complied completely with the findings requirement of UCA §76-3-201(4)(d)(i) by finding that restitution was appropriate, that total restitution amounted

to \$38,643.59, and that the amount of Court ordered restitution would be no less than complete restitution.

The defendant apparently reads the findings requirement in UCA §76-3-201(4)(d)(i) to apply not only to that subsection, but would have this Court apply the requirement to oblige trial courts to engage in a soliloquy touching upon each factor listed in paragraphs (8)(b) and (8)(c) of UCA §76-3-201 every time restitution is ordered, irrespective of whether the factors are relevant to the court's determination of appropriateness or inappropriateness of restitution. Specifically, the defendant assails the order of restitution in this case because (1) she believes the trial court ignored the fact that she would not likely pay full restitution before the end of her period of probation, and (2) because the trial court did not state that restitution was calculated toward her rehabilitation. As to the first point, the defendant presents this argument while acknowledging that payments were ordered at only \$100.00 per month, and she cites no authority suggesting that restitution must be ordered in no greater amount than can be fully paid during the period of probation.⁷ Absent such authority, the trial court cannot be found in error for exercising its discretion to make the defendant, rather than the victims or society, responsible for the whole of the damages she caused.

As to the second point, while the defendant is accurate in noting that the trial court did not discuss the rehabilitative effect of restitution, the defendant has likewise presented no discussion, either here or to the trial court, of why her payment of restitution is likely to be detrimental to her rehabilitation. As was noted in *State v. Twitchell*, a court's restitutive formula does not fail for

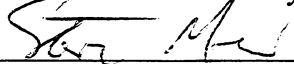
⁷ Anticipating that the defendant may respond by arguing that an order of restitution in an amount not easily paid unreasonably subjects her to the risk of being found in violation of her probation, the State notes that a defendant need only show that she has made a continuing good faith effort to pay restitution to avoid the court's contempt power. UCA §76-3-201.1(2).

taking into account punitive purposes instead of exclusively considering the defendant's rehabilitation. *Twitchell*, 832 P.2d 866, 869 (Utah App. 1992). As was also noted in *Twitchell*, an order of restitution is presumed to have a rehabilitative effect because "...there is a strong feeling that if the offender is made to suffer a loss and pay for the responsibility of the loss [she] caused, there is a greater likelihood [she'll] not do it again." *Id.* (quoting *State v. Dillon*, 637 P.2d 602 (Ore. 1981)). Thus, absent some explanation why concerns of rehabilitation mandate that less-than-complete-restitution be ordered, the defendant has not shown that the trial court abused its discretion in this restitution order.

CONCLUSION

The defendant inappropriately attributes to *State v. Robinson* the bright line rule that restitution may not be ordered for any driving-related criminal conduct. Dictum in *Robinson* notwithstanding, a defendant is not denied due process by an order of restitution where no question of liability is present. The defendant has not placed the finding of her liability at issue in this case--where she pled guilty to driving drunk and admitted she pulled into the path of another vehicle--and she has made no claim that would shift any of the liability away from her criminally negligent conduct. The defendant has likewise preserved no complaint regarding the adequacy of the trial court's reasons for refusing to order less than complete restitution. Accordingly, the trial court's order for the payment of full restitution is proper, and should not be disturbed.

Respectfully submitted this 20th day of May, 1997.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee was mailed, postage prepaid, to counsel for appellant, Matthew Nielsen, at Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 this 20th day of May, 1997.